86-611

No. 86-

Supreme Court, U.S.
FILED
OCT 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1986.

COSMO J. CATERINO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented for Review.

In light of the specific language of 26 U.S.C. § 6672 requiring willfulness and of this Court's decision in *Slodov* v. *United States*, 436 U.S. 238 (1978), which held that willfulness was an essential prerequisite to liability under 26 U.S.C. § 6672, may liability be imposed on an individual under that statute for failure to pay over payroll taxes of a corporation where the trial court made no implicit or explicit finding of willfulness?

Did the United States Court of Appeals for the First Circuit employ a proper standard of willfulness for purposes of 26 U.S.C. § 6672 when it stated that willfulness requires nothing more than knowledge that taxes are due and conscious disregard of the obligation to remit such taxes, and when it did not require proof that the party held responsible misused or permitted the misuse of funds earmarked for the taxes or permitted or caused payments to third parties while tax obligations were unsatisfied, as has been required by the other circuits which have addressed the issue?

May a trial court's decision be upheld where it fails to make any implicit or explicit findings on a central factual issue?

Parties.

Petitioner — plaintiff-appellant below — is Cosmo J. Caterino.

Respondent — defendant-appellee below — is the United States of America.

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No. 86-

In the
Supreme Court of the United States.

OCTOBER TERM, 1986.

COSMO J. CATERINO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioner Cosmo J. Caterino (the "Petitioner") respectfully petitions this Court, pursuant to 28 U.S.C. § 1254(1) and Rule 19 of the Rules of this Court, for a writ of certiorari to the United States Court of Appeals for the First Circuit in the case of *Caterino* v. *United States*, 794 F.2d 1 (1st Cir. 1986).

Opinions Below.

The decision of the court of appeals, entered on June 4, 1986, as amended upon the denial of Petitioner's petition for rehearing, on July 15, 1986, is reported at 794 F.2d 1 (1st Cir. 1986). Those decisions also appear in Appendices C and D.

Jurisdiction.

The judgment of the court of appeals was entered on June 4, 1986 and the decision on Petitioner's petition for rehearing was entered on July 15, 1986. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions.

This petition is concerned with 26 U.S.C. § 6672, which is contained in Appendix E.

Statement of the Case.

The case which is the subject of this petition was tried in the United States District Court for the District of Massachusetts. The district court had jurisdiction over the case under 28 U.S.C. § 1331 as the case involves a question of federal law.

In 1977, the United States Government assessed a tax penalty in the amount of $510,010.41 against the Petitioner pursuant

to 26 U.S.C. § 6672 for unpaid payroll and social security taxes that Northerlin Corporation ("Northerlin") was required to collect from its employees and pay to the government during the period from January 1, 1973 through June 30, 1974.

During the period for which the government sought to hold Petitioner responsible for Northerlin's taxes, Petitioner was not an officer, director, shareholder nor was he an employee of Northerlin. He did not participate in its operations, did not have signatory authority over its bank accounts, did not sign any Northerlin check, and did not have the power to control the disbursement of Northerlin funds. No witness testified that Petitioner in fact directed the disbursement of Northerlin funds or that he played any role whatsoever in the use of such funds.

In the early 1970's, Petitioner was president of Graham Stuart Corporation ("Graham Stuart"), a publicly-held corporation. In 1973, Graham Stuart sought to acquire the assets of Northerlin, which included its operating subsidiaries. Neither Petitioner nor Graham Stuart had any affiliation with Northerlin or any of its subsidiaries during any quarter in issue. In making the assessment of $510,010.41 against Petitioner, however, the government claimed that Petitioner had de facto control over Northerlin by virtue of loans made by Graham Stuart to Northerlin and because of Graham Stuart's efforts to acquire Northerlin's assets.

The evidence at trial established that Graham Stuart and Petitioner actively pursued the acquisition of Northerlin's assets during 1973. Also during 1973, Petitioner and Graham Stuart, in anticipation of the acquisition, made loans to Northerlin because Northerlin suffered cash flow shortages and Graham Stuart was interested in acquiring an operating business. During the calendar quarters in issue, Graham Stuart and Petitioner were involved with Northerlin to the extent necessary to pursue the acquisition and later to protect the loans, but neither was involved in managing Northerlin's business, neither

participated in its day-to-day operations, and neither exercised control at any time in issue over disbursements of Northerlin funds.

In the spring of 1974, the individuals who controlled Northerlin abandoned it. In late April and early July of 1974, completed but unsigned Northerlin withholding tax forms (forms 941), apparently prepared by a Northerlin employee, were mailed to Graham Stuart. At that time, Graham Stuart had been trying to protect its loans and was concerned that Northerlin's failure to file these forms would result in assessment of federal tax penalties against Northerlin. Such an assessment would have jeopardized repayment of the Graham Stuart loans.

An employee of Petitioner, acting with Petitioner's concurrence, and on the advice of Graham Stuart's certified public accountant, signed and filed those Northerlin tax forms which related to the first two quarters of 1984. During all of the relevant quarters including the time the forms 941 were signed, Petitioner, Graham Stuart, and the party who signed the forms were all physically located in Massachusetts and Northerlin was located in New York.

Graham Stuart never acquired Northerlin's assets. Petitioner became Northerlin's sole shareholder after the quarters in issue as the result of foreclosing on a loan. Prior to that time he had had no affiliation with Northerlin. The trial court made no finding and there was no evidence of any payment made to any creditors during the quarters for which Petitioner was ultimately held accountable. Nor were there findings or evidence of any misuse of entrusted funds or that the corporation had any funds during the quarters for which Petitioner was ultimately held accountable.

In order to contest the government's assessment, Petitioner paid a portion of the tax claimed and sought a refund. When a refund was denied, he brought the suit below to contest the assessment. The government counterclaimed for the taxes in issue.

The case was tried to the court in 1983. The trial court ruled from the bench immediately after trial and found that Petitioner was not a person responsible for Northerlin's taxes in any quarter of 1973, but ruled he was a responsible party for the first two quarters of 1974. The trial court made no finding of willfulness (Appendix A).

In 1984, Petitioner appealed the decision of the trial court, arguing that the trial court's factual findings concerning Petitioner's lack of control over Northerlin's purse strings precluded liability for unpaid taxes under 26 U.S.C. § 6672, as did the absence of a finding of willful failure to collect or pay such tax.

On December 4, 1984, the Court of Appeals for the First Circuit reversed the trial judge's decision because it could not determine from the trial decision whether liability was imposed because the trial judge found that Petitioner in fact controlled the financial activities of Northerlin or whether the trial court employed some "unfamiliar § 6672 test" based solely on the fact that Petitioner's employee signed the forms 941. Accordingly, the court of appeals remanded the case to the trial judge for clarification.

On June 27, 1985, without a hearing, the trial judge rendered a new judgment with additional findings (Appendix B). Once again, the trial court made no finding of willful conduct or failure to act.

In 1985, Petitioner appealed the decision on remand, maintaining that the evidence did not support the trial court's finding that during the first two quarters of 1974 Petitioner had the power to determine which creditors would be paid and which would not, and that that finding was clearly erroneous. Petitioner also maintained that the decision should have been reversed because the trial court again made no finding of willfulness.

On June 4, 1986, the court of appeals affirmed the decision on remand (Appendix C). The decision of the court of appeal erroneously stated that the trial judge found willfulness. Petitioner moved for rehearing, pointing out that the trial judge made no finding of willfulness. In its decision on the petition for rehearing, the court of appeals acknowledged that no finding of willfulness had been made, but denied the motion for rehearing. The court of appeals substituted various pages in the opinion to correct the inaccurate statement that the district court made a finding of willfulness (Appendix D, p. 20a).

Reasons for Granting the Writ.

In this case, the United States Court of Appeals for the First Circuit has employed a standard for willfulness for purposes of 26 U.S.C. § 6672 which substantially deviates from that adopted by the other circuits which have considered the issue.

In its decision in this case, the Court of Appeals for the First Circuit held that knowledge that taxes are due and a conscious disregard of an obligation to pay them is sufficient to establish willfulness. Every other circuit addressing the issue has required, either by express ruling or by implication, that the party responsible misused or permitted the misuse of trust funds earmarked for payroll taxes or caused or permitted other third-party creditors to be paid while the tax bill remained unsatisfied. In this case, the Court of Appeals for the First Circuit, using the standard it articulated, found willfulness where there was no evidence or finding of any misuse of entrusted funds nor of any payment to creditors for the quarters Petitioner was claimed to be a person responsible. In fact, there was no evidence the corporation had any funds for the relevant quarters.

The test for willfulness that emerges from the court of appeals' decision in this case would permit an imposition of liability under 26 U.S.C. § 6672 absent any diversion of funds to a party other than the government and conceivably when no corporate funds exist. The "conscious disregard" language means little if "conscious disregard" can be found, as it was in the present case, without any evidence or finding of some action or inaction manifesting such disregard. In fact, in this case, the court of appeals inferred willfulness from the district court's finding that Petitioner was a person responsible and from the fact that he caused the filing of the forms 941s, from which the court presumably concluded the Petitioner had knowledge of the tax obligation (Appendix D, p. 21a). The filing of those forms not only does not reflect disregard, but instead demonstrated concern for the corporation's obligation to file. Thus, under the court of appeals' standard, a party deemed to be responsible under the statute would effectively be held strictly accountable to pay a corporate tax obligation if he knew taxes were due. In effect, a knowledge standard has been substituted for the statutory willful requirement. No other circuit has permitted this result.

Moreover, the court of appeals' opinion in this case violates the letter and the spirit of this Court's opinion in *Slodov* v. *United States*, 436 U.S. 238 (1978). In the *Slodov* case, this Court held that "willfulness" was a crucial element in assessing liability under 26 U.S.C. § 6672. In the present case, the trial court imposed liability without explicit or implicit findings of willfulness, or even any discussion of the issue. The court of appeals let the trial decision stand despite its recognition that no such findings were made.

Finally, the decision of the court of appeals ignores the obligation imposed on the district courts by Rule 52 of the Federal Rules of Civil Procedure to find the facts specially. Here, no findings whatsoever were made on the central issue

of willfulness; in fact, the issue was never discussed in either of the two decisions rendered by the trial judge.

Argument.

A. *Willfulness.*

In its decision, the court of appeals stated that "[w]illfulness for purpose of section 6672 means no more than knowledge that taxes are due and withheld and conscious disregard of the obligation to remit them." (Appendix D, p. 21a.) It employed this standard and found willfulness under circumstances where there was no finding and no proof of either a diversion of funds or preference of other creditors, nor any proof that there were funds available. Since it inferred willfulness from the filing of the forms 941s and the district court's finding of responsibility, the court of appeals essentially established knowledge as willfulness (Appendix D, p. 21a).

Such a formulation under such circumstances is significantly different from that articulated or employed by the other circuits. Other circuits have either stated that willfulness requires the favoring of other creditors over the government or the misuse of funds earmarked for withholding taxes or have found willfulness only when such facts existed. *Barrett* v. *United States*, 580 F.2d 449, 454 (Ct. Cl. 1978), quoting *White* v. *United States*, 372 F.2d 513, 521 (Ct. Cl. 1967) ("'Willfulness' has been defined as 'a deliberate choice, voluntarily, consciously and intentionally made to pay other creditors instead of paying the government. . . .'"); *Maggy* v. *United States*, 560 F.2d 1372, 1375 (9th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). ("The willfulness requirement is met when a responsible officer voluntarily, consciously, and intentionally causes his cor-

poration to pay creditors out of withheld funds while he is aware that such funds are owed to the United States"); *Hartman* v. *United States*, 538 F.2d 1336, 1341 (8th Cir. 1976) ("It is sufficient [to establish willfulness] if the person acts or fails to act consciously and voluntarily and with knowledge or intent that as a result of his action or inaction trust funds belonging to the government will not be paid over, but will be used for other purposes"); *Harrington* v. *United States*, 504 F.2d 1306, 1311 (1st Cir. 1974) ("'Willful' has been defined as a voluntary, conscious and intentional decision to prefer other creditors to the United States, . . . "); *Newsome* v. *United States*, 431 F.2d 742, 745 (5th Cir. 1970) ("Willfulness is established by the knowing preference of other corporate creditors after the due date" or the "use of withheld funds for other corporate purposes before the date for the corporation to pay over the funds"); *Monday* v. *United States*, 421 F.2d 1210, 1216 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970). ("If you find that plaintiff and/or third party defendant knowingly used available funds to prefer other creditors over the United States, then you must find he acted willfully").

The position taken by each of these courts is consistent with this Court's decision in *Slodov*:

> As noted in the previous section, § 6672 as construed by the Government would, in effect, make the responsible person, assuming control of a business a guarantor for payment of the delinquent taxes simply by undertaking to continue operation of the business. That construction is precluded by the history and context of § 6672 and cognate provisions of the Code.

436 U.S. at 253-254.

If Petitioner can be held accountable for the taxes of Northerlin absent any finding or evidence that he caused or permitted payments to other creditors, or otherwise used the entrusted funds, then the government has succeeded in making Petitioner a guarantor. *Slodov* squarely prohibits such a result, but that is the result of the decision below.

The holding that knowledge plus conscious disregard is enough to satisfy the willfulness element, without any showing of fault such as the preference of other creditors over the government, is a significant deviation from the formulation of § 6672 willfulness as set forth in well-established authority from several circuits and is contrary to the teaching of *Slodov*. Without requiring such manifestations of a "conscious disregard", that phrase imposes no limitations.

Petitioner respectfully submits that the standard of willfulness employed by the court of appeals in this case, under the circumstances of this case, establishes a precedent in the First Circuit in conflict with the standard of willfulness adopted in the other circuits and would permit a finding of "faultless" willfulness predicated only on knowledge that a liability exists. That result is prohibited by *Slodov*.

B. *Findings.*

The imposition of liability under 26 U.S.C. § 6672 requires "two distinct findings", responsibility and "willful attempt to evade or defeat the tax." *Silberberg* v. *United States*, 355 F. Supp. 1163, 1166 (S.D.N.Y. 1973). "Responsibility without willfulness is not enough." *McCarty* v. *United States*, 437 F.2d 961 (Ct. Cl. 1971). This Court made it clear that the willfulness finding is an essential prerequisite to liability under § 6672:

> Section 6672 cannot be read as imposing upon the responsible person an absolute duty to "pay over" amounts which should have been collected and withheld. The fact that the provision imposes a "penalty" and is violated only by a "willful failure" is itself strong evidence that it was not intended to impose liability without personal fault. Congress, moreover, has not made corporate officers personally liable for the corporation's tax obligations generally, and § 6672 therefore should be construed in a way which respects that policy choice. The Government's concession — that § 6672 does not impose a duty on the responsible officer to use personal funds or even to liquidate corporate assets to satisfy the tax obligations — recognizes that the "pay over" requirement does not impose an absolute duty on the responsible person to pay back taxes.

Slodov v. *United States,* 436 U.S. at 254.

The trial court in the present case twice rendered findings of facts. On the first occasion, findings were rendered orally from the bench immediately after the conclusion of the trial. Petitioner appealed that decision, which was reversed and remanded. After the remand, the trial judge issued a new decision. Not only did the trial court make no finding in either set of findings of any willful action or failure to act, it did not even address the issue of willfulness (Appendices A, B).

A decision imposing liability under § 6672 may not be affirmed unless there are findings, which are not clearly erroneous, that the plaintiff acted willfully. In the present case, there were no findings of willfulness nor was there even any discussion of willfulness from which such finding might have been inferred.

The trial court's failure to make findings on the essential element of willfulness violates the requirements of Fed. R. Civ. P. 52(a). Rule 52(a) states that "the Court shall find the facts specially." The requirements of the rule are not met "by the statement of the ultimate fact without the subordinate factual foundation for it which also must be the subject of specific findings." *O'Neal* v. *Gresham*, 519 F.2d 803, 806 (4th Cir. 1975), quoting *O'Neill* v. *United States*, 411 F.2d 139, 146 (3d Cir. 1969). *See also Rucker* v. *Higher Educational Aids*, 669 F.2d 1179 (7th Cir. 1982). The court must make findings on all essential facts. *Bay Sound Transp. Co.* v. *United States*, 410 F.2d 505 (5th Cir.), *cert. denied*, 396 U.S. 928 (1969).

When the court of appeals initially issued its opinion, it incorrectly stated that the trial judge found willfulness (Appendix C). After Petitioner moved for a rehearing, the court of appeals, upon denying the motion, substituted pages in the original decision deleting the mistatement that the trial judge found willfulness (Appendix D, p. 20a). The court nonetheless reached the same conclusion.

In the substituted pages, the court of appeals justified affirming the judgment absent any findings of willfulness by relying on *Gulf Towing Co., Inc.* v. *Steam Tanker, Amoco, N.Y.*, 648 F.2d 242 (5th Cir. 1981) and *Seligson* v. *Roth*, 402 F.2d 883 (9th Cir. 1968) (Appendix D, p. 21a). Neither decision supports a waiver of the requirement for findings.

The court in *Gulf Towing* stated that, where a trial court fails to comply with Rule 52(a), a remand is appropriate except where "a complete understanding of the issues is possible in the absence of separate findings and if there is a sufficient basis for the appellate court's consideration of the merits of the case." 648 F.2d at 245. Here, the trial judge did not even discuss willfulness nor did he discuss the factors which go into determining willfulness. The court of appeals therefore did not have the remotest clue as to what the trial judge's con-

clusions on the element of willfulness might have been, let alone a sufficient basis for a complete understanding of those conclusions.

In *Seligson* v. *Roth,* the appellant complained that in ruling on a voidable preference claim the trial court did not render subsidiary findings supporting the ultimate finding that appellee had no reason to believe a company was insolvent. The court there said that findings are adequate if "they are sufficiently comprehensive and pertinent to the issues to provide a basis for the decision" and "they are supported by the evidence." 402 F.2d at 887, quoting *Carr* v. *Yokohama Specie Bank, Ltd.,* 200 F.2d 251, 255 (9th Cir. 1952). Unlike *Seligson,* in this case there was not even a finding on the ultimate issue, willfulness, let alone subsidiary findings. Furthermore, where there is no discussion of willfulness at all, it can hardly be said that there was a "sufficiently comprehensive" foundation to provide a basis for the decision.

Grover Hill Grain Co. v. *Baughman-Oster, Inc.,* 728 F.2d 784, 793 (6th Cir. 1984) and *Triangle Conduit & Cable Co.* v. *Federal Trade Commission,* 168 F.2d 175, 179 (7th Cir. 1948) *aff'd sub nom., Clayton Mark & Co.* v. *Federal Trade Commission,* 336 U.S. 956 (1949), also relied on by the court of appeals, state only that facts may be inferred from other facts found. Here, there were no facts found from which willfulness could be inferred, and the court pointed to none. The court of appeals inferred willfulness from the district court's finding that Petitioner was a person responsible and that he directed the filing of the tax returns (Appendix D, p. 21a). Under the standard employed by the other circuits these findings are not pertinent to the independent issue of willfulness.

By trivializing the requirement of a finding of willfulness, the court of appeals has effectively deleted willfulness as a prerequisite in the First Circuit to the imposition of liability under 26 U.S.C. § 6672. The decision in the present case allows

willfulness to be essentially bootstrapped from a finding of responsibility. This is contrary to the teaching of *Slodov*.

Accordingly, the trial judge should have made findings not only on "willfulness" but on the subsidiary facts supporting the conclusion. Absent such findings, the judgment should have been reversed.

Conclusion.

For the reasons stated above, this Court should grant the Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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October 10, 1986

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Appendix A.

Relevant Portions of Transcript.

. . . . . .

[2-115] THE COURT: I have in mind that the burden of proof is on the Plaintiff here. I make the following findings of fact: I find that Mr. Caterino through his corporation, Graham Stuart, agreed to purchase the assets of Northerlin as of August 31, 1973, but that the transaction was never closed.

I find that Mr. Caterino continued his interest in purchasing the Northerlin operations in one form or another and intended to do so, and, consequently, to keep the operation going arranged for large amounts of money to be infused into the operation through direct loans and bank credit guaranteed by him.

I further find that he took an active interest in the operation and conferred with the prior management, which remained in position at least until December of 1973, and that he put his weight behind a decision made by Mr. Verville, Mr. Fleck, and Mr. Schutte that Mr. Gilbert should give up his position as manager of Northerlin.

[2-116] I find it more likely than otherwise that Mr. Caterino did not have such control of the company as would give him the power to chose [*sic*] who got paid and who did not. To the extent that the statement that the subsidiaries of Northerlin were being operated by Graham Stuart is true, it is true to the extent that without the infusion of funds from Graham Stuart and Caterino, it would appear that those subsidiaries would not have continued to operate.

Accordingly, I find that Mr. Caterino was not a responsible person with respect to the withheld employee taxes for the third and fourth quarters of 1973, and I gather the Government

in effect concedes that he was not a responsible person for the first two quarters of 1973, because he really did not do much in connection with Northerlin.

With respect to the first and second quarters of 1974, however, I see a different situation. When these 941's for those periods were presented to him unsigned, he undertook to cause them to be signed by his employee, Mr. Patten, and he did so because he was informed that there were no officers left in the company down in Flushing. His position, therefore, was unlike the bookkeeper who was directed to sign in the course of his work, and he undertook the [2-117] responsibility for signing because there were no other officers who could do so. And I find that with respect to those returns, he undertook to act as a responsible officer of Northerlin and that along with the assumption of the responsibility for filing the returns, he undertook the responsibility as a matter of law for seeing to it that the sums reported in those returns were paid.

Accordingly, I find that the Plaintiff, Caterino, is a responsible person with respect to the first and second quarters of 1974. Accordingly, the Plaintiff is not entitled to a refund of the $200 already paid, and I find for the Defendant, United States, on its counterclaim to the extent of the amounts stated on the forms 941 for the first and second quarters of 1974, said to be owing, plus the interest from the time they should have been paid.

. . . . . .

Appendix B.

United States District Court
District of Massachusetts

COSMO J. CATERINO, Plaintiff,	*	
	*	CIVIL ACTION
V.	*	NO. 79-1691-S
	*	
UNITED STATES OF AMERICA, Defendant	*	

MEMORANDUM AND ORDER FOLLOWING REMAND

June 27, 1985

SKINNER, D.J.

This action was brought to recover a refund of a portion of penalties assessed against the plaintiff by the Internal Revenue Service. The United States counterclaimed for the balance of the assessment. The assessment related to income tax withheld from employees of Northerlin Company, Inc. of Flushing, New York for all four quarters of 1973 and the first two quarters of 1974. The burden was on the plaintiff to show that he was not a "person required to collect, truthfully account for, and pay over" the withheld taxes. I found that the plaintiff had sustained his burden with respect to 1973, but not as to the first two quarters of 1974. Judgment was entered for the United States on its counterclaim for the balance of the assessment for the first two quarters of 1974.

The Court of Appeals vacated this judgment and remanded the case for clarification of the findings of fact which I announced orally from the bench. Without rehashing the whole case I shall try to respond directly to the questions raised by the Court of Appeals:

(1) My finding that "it is more likely than otherwise that Mr. Caterino did not have control of [Northerlin] as would give him the power to choose who got paid and who did not" applies only to 1973 and not to 1974.

(2) The "different situation" I perceived with respect to the first two quarters of 1974 was that plaintiff did not carry his burden of proof that he had not "gained actual power to choose how Northerlin's money was to be spent and thus had become a responsible person" with respect to those quarters.

By the time that payment for the first quarter of 1974 was due, March 30, 1974, the responsible executives of Northerlin had resigned. The former manager, Edward Gilbert, had been replaced by Jost Fleck in the fall of 1973, had remained at the Northerlin offices until January 1974, and then had left. There is evidence that Fleck was the plaintiff's man, and had been put in charge of Northerlin as a result of pressure applied by the plaintiff, who had in effect been providing Northerlin with its entire working capital through 1973, either through his own funds, that of his corporation Graham Stuart Corporation, or by guaranteeing bank credit. Fleck in turn left in early 1974. There was no one in titular charge of Northerlin's business after Fleck left.

In July of 1974, the plaintiff became the sole stockholder and president of Northerlin. His testimony that between the departure of Fleck and his own assumption of titular control he asserted no control over the daily affairs of Northerlin is not credible in view of (a) the very large investment of his personal funds and those of Graham Stuart in Northerlin, and (b) the extent to which he regularly monitored the operations of

Gilbert and Fleck while they were nominally in charge of the business. The filing of the 941 forms on behalf of Northerlin by the plaintiff's bookkeeper, at the plaintiff's direction, while not of independent legal significance, is at least some evidence of the devolution of control to the plaintiff by default, and his assumption thereof.

If the burden of proof were on the United States to prove control, the United States would clearly fall on this evidence. The burden of proof is on the plaintiff to prove lack of control, however. This may well be unfair, but in tax matters the usual rules of fairness have been upended by Congress and the courts. The statutory burden of proof is no longer subject to challenge. In my view, the plaintiff has not met his burden of proof.

Accordingly, I find for the defendant on the plaintiff's claim of refund with respect to the first two quarters of 1974, and I find for the defendant on the counterclaim in the amount of $128,505.30 with interest from the date of assessment, April 11, 1977. Judgment shall enter accordingly.

/s/ Walter Jay Skinner

United States District Judge

Appendix C.

United States Court of Appeals for the First Circuit

No. 85-1703

COSMO J. CATERINO,
Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before
Breyer, *Circuit Judge*,
Aldrich and Rosenn,* *Senior Circuit Judges*.

Gary S. Matsko with whom *Davis, Malm & D'Agostine* was on brief for appellant.

Murray S. Horwitz, Tax Division, Department of Justice, with whom *Glenn L. Archer, Jr.*, Assistant Attorney General,

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* Of the Third Circuit, sitting by designation.

Michael L. Paup and *Wynette J. Hewett*, Tax Division, Department of Justice, and *William F. Weld*, United States Attorney, were on brief for appellee.

June 4, 1986

ROSENN, *Circuit Judge*. This appeal raises the factually difficult issue of third-party liability for income and social security taxes that an employer has withheld from the wages of employees but failed to remit to the federal government. Northerlin Company, Inc., the employer, withheld approximately $500,000 for the period from January 1, 1973, through June 30, 1974, but did not transmit the money to the Government. Cosmo J. Caterino (the taxpayer), individually and as president of Graham Stuart Corporation, made loans to and negotiated to buy Northerlin. Because of Caterino's role with Northerlin, the Internal Revenue Service sought to hold him personally liable for Northerlin's failure to remit the withheld taxes. After a bench trial in the United States District Court for the District of Massachusetts, the court held Caterino liable for the taxes withheld for the first two quarters of 1974 and entered judgment against him in the sum of $128,505.30 with interest from the date of assessment, April 11, 1977. Caterino appeals. We affirm.

I.

A.

The Internal Revenue Code requires employers to withhold social security and federal income taxes from employees'

wages, 26 U.S.C. §§ 3102, 3402 (1982), and to hold such amounts in trust for the United States. 26 U.S.C. § 7501 (1982). Because the Internal Revenue Service (IRS) has no recourse against employees who have had income and social security taxes withheld from their wages, the Code imposes liability on certain individuals whom it deems to be in positions to determine whether employers remit withheld taxes to the government. 26 U.S.C. § 6672 provides in pertinent part:

> § 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax.
>
> (a) General rule. — Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to . . . pay over such tax, . . . shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

The two elements essential to liability of a third party are that the person be "responsible" and act "willfully" within the meaning of section 6672. *Harrington v. United States*, 504 F.2d 1306, 1312-13 (1st Cir. 1974); *Maggy v. United States*, 560 F.2d 1372, 1374-75 (9th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Werner v. United States*, 374 F. Supp. 558, 560 (D. Conn. 1974), *aff'd per curiam*, 512 F.2d 1381 (2d Cir. 1975). The issue in this appeal is whether the factual findings that support the district court's conclusions of responsibility and willfulness are clearly erroneous.

B.

Northerlin Company, Inc. at all times relevant to this case engaged in waterproofing basements through its twelve subsid-

iaries and through its own division, the Vulcan Basement Waterproofing Company. Edward Gilbert held a controlling interest in Northerlin until Caterino purchased all of the outstanding capital stock on June 3, 1974.

In early 1973, Caterino began negotiations on behalf of Graham Stuart, in which he held the majority stock, to purchase the assets of Northerlin. Graham Stuart is a company organized to hold ownership interests in other companies. On January 25, 1973, Caterino in his personal capacity signed a note in the amount of $240,000 to the order of Northerlin for its use as collateral on a bank loan. Through this note Caterino effectively guaranteed a loan to Northerlin. On July 30, 1973, Graham Stuart entered into a written agreement to purchase all of Northerlin's assets, including the stock in its subsidiaries. Under the agreement, the purchase was to be consummated on August 31, 1973, when Northerlin would be required to submit certified financial statements. Northerlin, however, failed to submit the statements and the parties postponed the sale. As matters developed, they never concluded the sale.

In the meantime, Caterino, acting on an individual basis and at times in a corporate capacity in behalf of Graham Stuart, undertook a series of measures to aid Northerlin in surmounting its financial problems. In August 1973, he assisted Northerlin in obtaining a loan from the Northern Ohio Bank in the sum of $500,000. On September 5, 1973, Graham Stuart, having opened a checking account a few days before with Northerlin's address, adopted a resolution authorizing Caterino, a Northerlin officer, and Northerlin's general manager, Gilbert, to sign checks on that account.

On October 29, 1973, Caterino, as president of Graham Stuart, borrowed $300,000 from the Northern Ohio Bank and lent it to Northerlin. Caterino testified that he made the loan to keep Northerlin in operation until it entered its season. Caterino also visited most of Northerlin's branches. He nego-

tiated a lease on behalf of Northerlin for one branch and, in response to his recommendations, Northerlin closed several others.

In December 1973 Caterino became involved in the replacement of Northerlin's general manager Gilbert with Jost Fleck. In a letter he wrote January 17, 1974, to his attorney at the request of the Securities and Exchange Commission, Caterino referred to this event as a "management change[ ] made by me." The district court, however, found that Caterino did not alone have the power to make the change at that time but "put his weight behind" a decision made by Northerlin officials. Gilbert resigned on January 4, 1974, and Fleck became general manager. On January 18, 1974, Caterino wrote a letter to the Northern Ohio Bank authorizing Northerlin employees Schutte, Fleck, and Verville to transfer funds from the Graham Stuart account by telephone.

By April 1974, the prospects of keeping Northerlin afloat had become rather bleak. Northerlin's officers had abandoned the company. A Northerlin employee prepared Northerlin's first quarter 1974 payroll tax return and because of the vacuum in management mailed it to Caterino. Caterino and his bookkeeper sought the advice of Graham Stuart's certified public accountant, who advised the bookkeeper to sign the form as "agent" and mail it to the IRS. The bookkeeper did so, he testified, in order to avoid the imposition of penalties on Northerlin and the further weakening of the company. In July 1974 Graham Stuart received Northerlin's completed and unsigned return for the second quarter of 1974. The bookkeeper again signed as agent and mailed the return to the IRS. On June 3, 1974, approximately a month before Graham Stuart received the second tax return, Caterino purchased all outstanding Northerlin stock and became the sole owner of the company.

On April 11, 1977, the IRS assessed a 100 percent tax penalty of $510,010.41 against Caterino pursuant to 26 U.S.C.

§ 6672. The amount comprised taxes withheld from wages for all four quarters of 1973 and the first two quarters of 1974. To contest the assessment, Caterino paid $200, the withholding taxes for one employee for the first quarter of 1973. He then filed a claim for a refund, which the Government denied. Caterino initiated this refund suit and the Governmennt counterclaimed for $420,041.79.

After a two day bench trial the court concluded that Caterino's involvement with Northerlin was insufficient to make him "responsible" for 1973 under section 6672 but was sufficient to make him "responsible" for the first two quarters of 1974. The court accordingly entered judgment requiring Caterino to pay the withholding taxes for that period.

Caterino raised two issues in an earlier appeal. He argued, first, that the court held him liable solely because he caused the tax returns to be filed, and second, that the district court had failed to explicitly find his conduct was willful, and that his conduct could not have been willful because he lacked the power to avoid non-payment. The Government responded that first, the filing of the returns was but one of a number of indicia of Caterino's ability to control Northerlin's affairs and second, the record demonstrated the presence of willfulness and the court's failure to explicitly so find was not reversible error.

On December 4, 1984, this court in an unpublished opinion stated that we were "unable to discern the critical findings and theory upon which the district court awarded judgment to the United States for the first two quarters of 1974." We could not determine whether the trial court imposed liability because Caterino had power in Northerlin's affairs or if it employed some "unfamiliar § 6672 test" based solely on Caterino's filing of the forms. We therefore vacated the judgment and remanded for clarification.

Taxpayer filed no new pleadings. The district court entered a memorandum and order holding that Caterino was not entitled to a refund and that the Government should prevail on its counterclaim. The court did not rely solely on Caterino's filing of the tax returns, but considered the filing to be some evidence of the passage to him of control by default. Further, it found incredible Caterino's testimony that he asserted no control over Northerlin's daily affairs after Fleck left. Caterino appeals.

II.

Our task on appeal is to determine, first, whether the district court erred in finding that Caterino had sufficient control over Northerlin to render him "responsible" under section 6672 for the failure to remit the taxes withheld, and, second, whether the facts support the district court's conclusion of "willfulness." We turn to the former issue.

A.

Courts have explicitly given the word "responsible" a broad interpretation. *Commonwealth National Bank of Dallas v. United States,* 665 F.2d 743, 757 (5th Cir. 1982). They have fashioned an elastic definition predicated upon the function of an individual in the employer's business, not the level of the office held: whether the person had the power to determine whether the taxes should be remitted or paid or had "the final word as to what bills should or should not be paid and when." *Adams v. United States,* 504 F.2d 73, 75 (7th Cir. 1974), *cert. denied sub nom. Estate of Klein v. Commissioner,* 421 U.S. 991 (1975). In the context of this case, "the word 'final' means significant rather than exclusive control over the disbursement of funds." *Neckles v. United States,* 579 F.2d 938, 940 (5th

Cir. 1978); *Emshwiller v. United States*, 565 F.2d 1042, 1045 (8th Cir. 1977); *Adams*, 504 F.2d at 75. Under certain circumstances, lenders and even employees of lenders have been held "responsible" under section 6672. *Fidelity Bank N.A. v. United States*, 616 F.2d 1181, 1185 (10th Cir. 1980); *United States v. Graham*, 309 F.2d 210, 212 (9th Cir. 1962).

Although the rule appears harsh, as in other tax litigation a person who challenges a section 6672 assessment bears the burden of persuasion to prove lack of control. *See United States v. Rexach*, 482 F.2d 10, 16-17 (1st Cir.), *cert. denied*, 414 U.S. 1039 (1973); *United States v. Pompanio*, 635 F.2d 293, 296 (4th Cir. 1980). The district court concluded that Caterino did not carry this burden and is therefore "responsible" under section 6672.

Central to this appeal is Caterino's contention that the district court erred in finding that, for the first two quarters of 1974, he had sufficient control of the company to decide whom to pay and not to pay. This court cannot reverse merely because it is convinced that it would have decided the question differently; we must ascertain whether the finding of fact is clearly erroneous. *Anderson v. Bessemer City*, 53 U.S.L.W. 4314, 4317 (U.S. March 19, 1985). We must affirm if the finding is reasonably supported on the record as a whole, *Bruce Drug, Inc. v. Hollister Inc.*, 688 F.2d 853, 854 (1st Cir. 1982). We must reverse when a review of the entire evidence leaves this court with the "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

We are persuaded that the district court's overview of Caterino's evolving relationship with Northerlin is accurate. Caterino commenced his relationship with Northerlin in a normal effort to have Graham Stuart acquire it. By the fall of 1973, however, his frustrated struggle to consummate the purchase reached a point where he personally was becoming directly

involved in the financial and operational problems of the foundering prospect. He lent money to Northerlin because of the planned acquisition; when it became evident that the sale could not be concluded, Caterino cemented his relationship to protect his loans. He testified that he asserted no control over Northerlin's daily affairs prior to purchasing the company's capital stock in July 1974, despite his frequent contacts with the company. The district court, however, did not find this testimony to be credible. Moreover, failure to assert control over the operations of the company is not sufficient to allow Caterino to escape liability under section 6672. It may appear severe to impose liability upon a non-officer of a company, but Congress has chosen to impose responsibility on one who has the ability to determine whom a company will or will not pay.[1] *Adams v. United States, supra.*

Early in 1974, by virtue of the substantial loans Caterino had arranged or guaranteed for Northerlin, he had become a dominant force in piloting the course of the company. He was instrumental in installing Fleck as general manager. Fleck's abandonment of Northerlin created a power vacuum and Northerlin employees apparently looked to Caterino to fill it. The mailing of the withholding tax returns to Caterino illustrated the devolution of authority to him. The evidence shows that Caterino did have the ability to significantly determine the

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[1] Responsible persons under section 6672 can include those who are neither officers nor employees of the corporation owing the taxes. *Fidelity Bank v. United States,* 616 F.2d 1181, 1185 (10th Cir. 1980); *Pacific National Insurance Co. v. United States,* 422 F.2d 26, 30 (9th Cir.), *cert. denied,* 398 U.S. 937 (1970); *Commonwealth National Bank of Dallas,* 665 F.2d at 750-51; *Werner,* 374 F. Supp. at 562. The statute may impose responsibility on a surety for the employer, *Pacific National Insurance Co.,* 422 F.2d at 30-31, a creditor of the employer, *Adams,* 504 F.2d at 75-6; *Mueller v. Nixon,* 470 F.2d 1348, 1350 (6th Cir. 1972); *Commonwealth Bank of Dallas,* 665 F.2d at 755, and an individual who provides funds to the employer, *Werner,* 374 F. Supp. at 562.

flow of disbursements of funds by Northerlin. He did not become liable solely by ordering his bookkeeper to sign and mail the forms. Rather, the management's abdication together with the mailing of the returns to and their filing by Caterino demonstrate that he had become the only remaining authority figure and that he had the power to substantially control whom Northerlin paid. We conclude that the district court's finding that Caterino had sufficient power in early April 1974 to control what creditors Northerlin would pay is not clearly erroneous. Therefore, its conclusion that Caterino is "responsible" within the meaning of section 6672 is not incorrect.

B.

The district court also held that Caterino's actions met the "willfulness" requirement. Willfulness in this context is the "voluntary, conscious, and intentional decision to prefer other creditors to the United States." *Harrington*, 504 F.2d at 1311; *Newsome v. United States*, 431 F.2d at 742, 746 (5th Cir. 1970). Any responsible person who knows the taxes are not paid and allows the business to pay other creditors acts willfully. *See Maggy*, 560 F.2d at 1375; *Hartman v. United States*, 538 F.2d 1336, 1341 (8th Cir. 1976). Evil motive and specific intent are not necessary elements. *Harrington*, 504 F.2d at 1311; *Monday v. United States*, 421 F.2d 1211, 1216 (7th Cir. 1970). Mere knowledge, or reckless disregard for known risks, is sufficient. *Monday*, 421 F.2d at 1215.

It is undisputed that Caterino learned of the unpaid 1973 withholding taxes no later than March 1974, and of the unpaid 1974 withholding taxes when he received the returns in April and July of 1974. Willfulness for purpose of section 6672 means no more than knowledge that taxes are due and withheld and conscious disregard of the obligation to remit them. The "penalty" that the statute assesses for a violation is not punitive;

it simply consists of payment of the tax that was due. We conclude that the district court made no error in holding that Caterino acted willfully under section 6672.[2]

III.

We perceive no error in the district court's conclusion that Caterino was "responsible" and acted "willfully" within the meaning of 26 U.S.C. § 6672. Accordingly, we affirm the district court's judgment imposing liability on Caterino for Northerlin's withheld income and social security taxes for the first two quarters of 1974.

AFFIRMED.

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[2] Findings are adequate if a reviewing court has a clear understanding of the basis of the trial court's decision. *See Falcon Equipment Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806, 808 (8th Cir. 1976); *Fluor Corp. v. United States ex rel. Mosher Steel Co.*, 405 F.2d 823, 828 (9th Cir.), *cert. denied*, 394 U.S. 1014 (1969).

Appendix D.

United States Court of Appeals for the First Circuit

No. 85-1703.

COSMO J. CATERINO,
Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA,
Defendant, Appellee.

BEFORE

BREYER, *Circuit Judge*,
ALDRICH AND ROSENN,* *Senior Circuit Judges*.

ORDER OF COURT

Entered: July 15, 1986

Upon consideration of appellant's petition for rehearing,

It is ordered that said petition be and the same hereby is denied.

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* Of the Third Circuit, sitting by designation.

It is further ordered that the opinion of this Court be amended by adding the attached pages 8, 11, 12 and 13 in place of the present pages 8, 11 and 12.

By the Court,

/s/ Francis P. Scigliano

Clerk.

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[8] whether the district court's findings support an inference of "willfulness." We turn to the former issue.

A.

Courts have explicitly given the word "responsible" a broad interpretation. *Commonwealth National Bank of Dallas v. United States*, 665 F.2d 743, 757 (5th Cir. 1982). They have fashioned an elastic definition predicated upon the function of an individual in the employer's business, not the level of the office held: whether the person had the power to determine whether the taxes should be remitted or paid or had "the final word as to what bills should or should not be paid and when." *Adams v. United States*, 504 F.2d 73, 75 (7th Cir. 1974), *cert. denied sub nom. Estate of Klein v. Commissioner*, 421 U.S. 991 (1975). In the context of this case, "the word 'final' means significant rather than exclusive control over the disbursement of funds." *Neckles v. United States*, 579 F.2d 938, 940 (5th Cir. 1978); *Emshwiller v. United States*, 565 F.2d 1042, 1045 (8th Cir. 1977); *Adams*, 504 F.2d at 75. Under certain circumstances, lenders and even employees of lenders have been held "responsible" under section 6672. *Fidelity Bank N.A. v. United States*, 616 F.2d 1181, 1185 (10th Cir. 1980); *United States v. Graham*, 309 F.2d 210, 212 (9th Cir. 1962).

Although the rule appears harsh, as in other tax litigation a person who challenges a section 6672 assessment bears the burden of persuasion to prove lack of control. *See United States v. Rexach*, 482 F.2d 10, 16-17 (1st Cir.), *cert. denied*, 414 U.S. 1039 (1973); *United States v. Pompanio*, 635 F.2d

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[11] did have the ability to significantly determine the flow of disbursements of funds by Northerlin. He did not become liable solely by ordering his bookkeeper to sign and mail the forms. Rather, the management's abdication together with the mailing of the returns to and their filing by Caterino demonstrate that he had become the only remaining authority figure and that he had the power to substantially control whom Northerlin paid. We conclude that the district court's finding that Caterino had sufficient power in early April 1974 to control what creditors Northerlin would pay is not clearly erroneous. Therefore, its conclusion that Caterino is "responsible" within the meaning of section 6672 is not incorrect.

B.

The district court did not directly address the "willfulness" requirement. Willfulness in this context is the "voluntary, conscious, and intentional decision to prefer other creditors to the United States." *Harrington*, 504 F.2d at 1311; *Newsome v. United States*, 431 F.2d at 742, 746 (5th Cir. 1970). Any responsible person who knows the taxes were not paid and allows the business to pay other creditors acts willfully. *See Maggy*, 560 F.2d at 1375; *Hartman v. United States*, 538 F.2d 1336, 1341 (8th Cir. 1976). Evil motive and specific intent are not necessary elements. *Harrington*, 504 F.2d at 1311; *Monday v. United States*, 421 F.2d 1211, 1216 (7th Cir. 1970). Mere knowledge, or reckless disregard for known risks, is sufficient. *Monday*, 421 F.2d at 1215.

[12] It is undisputed that Caterino learned of the unpaid 1973 withholding taxes no later than March 1974, and of the unpaid 1974 withholding taxes when he received the returns in April and July of 1974. He contends, however, that no evidence was introduced that in 1974 Northerlin diverted funds to pay other creditors or that it even had any funds. This argu-

ment fails for two reasons: first, Caterino did not raise the issue in the district court; second, he had the statutory burden of proof in this proceeding and he never attempted to meet it on this issue.

Willfulness for purpose of section 6672 means no more than knowledge that taxes are due and withheld and conscious disregard of the obligation to remit them. We have no difficulty in inferring willfulness from the district court's finding that Caterino had assumed control over Northerlin early in 1974 and had directed the filing of the tax returns.[2]

[13] We perceive no error in the district court's conclusion that Caterino was liable under 26 U.S.C. § 6672. Accordingly, we affirm the district court's judgment imposing liability on Caterino for Northerlin's withheld income and social security taxes for the first two quarters of 1974.

AFFIRMED.

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[2] Caterino argues on appeal that the trial judge after previous remand again failed to make findings of fact with respect to willfulness. Although such a finding would have facilitated our evaluation as to whether willfulness was present, the finding is not indispensable to an understanding of the basis of the district court's decision. The failure of the trial judge in a non-jury action to comply with Rule 52(a) of the Federal Rules of Civil Procedure with respect to a finding of fact does not require a remand or impel a reversal of a correct judgment "if a complete understanding of the issues is possible in the absence of separate findings and if there is a sufficient basis for the appellate court's consideration of the merits of the case." *Gulf Towing Co., Inc. v. The Steam Tanker, Amoco New York*, 648 F.2d 242, 245 (5th Cir. 1981); *Seligson v. Roth*, 402 F.2d 883, 887 (9th Cir. 1968). Willfulness in failing to pay the taxes may be inferred from the other facts found by the district court which will support the judgment and under such circumstances "such inferences should be deemed to have been drawn by the District Court." *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 793 (6th Cir. 1984); *Triangle Conduit & Cable Co. v. Federal Trade Commission*, 168 F.2d 175, 179 (7th Cir. 1948), *aff'd sub nom. Clayton Mark & Co. v. Federal Trade Commission*, 336 U.S. 956 (1949). The willfulness issue is not so complex as to preclude our understanding of it without specific findings of fact. The absence of a finding is fatal if it could not be told which way the court intended. Here the inference is clear.

Appendix E.

§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax.

(a) General rule. Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.